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PETITION FOR CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-509

LUTHER DEWEY MELTON, JR.
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Petitioner, Luther Dewey Melton, Jr., prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on September 9, 1971.

OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit affirming a judgment of conviction entered upon a jury verdict in the United States District Court for the Eastern District of Virginia, at Norfolk, is embodied in a per curiam opinion which has not been reported. The opinion appears in the Appendix, *infra*.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on September 9, 1971. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254 (1). The time for filing the petition will expire on October 9, 1971.

QUESTIONS PRESENTED

1. Whether undocumented and unsupported accusations of other criminal offenses forgery or embezzlement, unrelated to the prosecution of this case by the Assistant United States Attorney constituted reversible error.

2. Whether it was reversible error for the trial court to refuse to permit into evidence certain letters from defendant's commanding officer which tended to show a course of dealing and which were offered to corroborate and clarify defendant's testimony as to his knowledge and intent in the transactions which were the subject of the offenses charged.

3. Whether it was reversible error for the trial court to refuse to include "specific intent" as one of the necessary elements of the offenses charged in its instructions to the jury.

STATUTE INVOLVED

Title 18, United States Code, Section 641:

"Public Money, Property or Records

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725."

STATEMENT OF THE CASE

A. Proceedings

After trial by jury, petitioner, Luther Dewey Melton, Jr., was convicted of eight counts of unlawfully, without authority, selling, conveying and disposing of certain surplus property belonging to the United States and having a value of more than $100.00. 18 U.S.C. §621. Final judgment on the jury verdict was entered by the United States District Court for the Eastern District of Virginia on November 25, 1970, following petitioner's post-trial motion to set aside the verdict and acquit him or in the alternative to grant a new trial. The District Court did not enter a written opinion in this case.

At the trial in the District Court and on the post trial motion to set aside the verdict petitioner raised the issues herein presented. These same issues were raised on appeal to the United States Court of Appeals for the Fourth Circuit which affirmed the District Court.

Petitioner contended below that the United States Attorney improperly accused him of crimes not involved in this prosecution without any substantiation or evidence thereof. The

prosecution during cross-examination of the defendant inquired into a certain invoice containing prices of surplus government property. The Assistant United States Attorney asked the petitioner whether he had prepared the invoice and the defendant answered in the negative, whereupon the prosecutor asked:

> "Didn't you try to forge Mr. Holt Barnes's signature on this invoice?" Tr. 503.

The Court permitted this question over the objection of counsel.

Further, the prosecution on cross-examination proceeded to inquire into certain checks made payable to the petitioner's National Guard Battery from the Commonwealth of Virginia and deposited in petitioner's own personal checking account, suggesting his improper conduct on a collateral issue. The prosecution in regard to a certain "Invoice for State Allotment" also suggested that certain figures were altered by asking: "Is there anything unusual about the way those figures are placed in there?" After suggesting that the numbers were altered by petitioner, the prosecutor asked: "And that was done to cover up the $175 that you had embezzled?" Tr. 571. The Court refused at petitioner's request to either admonish the prosecutor or instruct the jury to disregard the question, but allowed the jury to consider the evidence as to Melton's credibility. Tr. 580.

The trial court refused to allow into evidence Defendant's Exhibit 7 which consisted of letters from General Booth, Commander of the Virginia National Guard at the time, which petitioner contended below would have shown a course of dealing and would have corroborated his testimony as to his knowledge and intent in the transactions which were the subject of the prosecution. The District Court refused to admit Defendant's Exhibit 7 into evidence (Tr. 243, 246) and refused to allow petitioner to inquire into what the General told him of the ownership status of equipment that was transferred by petitioner.

The petitioner further contended below that the District Court improperly refused to grant instructions requested by the petitioner that he must have known that he did not have authority to transfer the property in order to be convicted. Tr. 621, 713-715; Defendant's Requested Charges "A" and "B", printed in the Appendix, *infra*. The District Court's charge set out the elements of the offense as follows (Tr. 699):

> "(1) That he knowingly and intentionally did sell, convey or dispose of property;
>
> (2) That the property belonged to the United States or some department or agency thereof; and
>
> (3) That such was done without authority."

The Court then defined "unlawfully," "willfully" and "knowingly" without relating to the facts of this case, and the term "specific intent" was employed as a definition or explanation of willfully (Tr. 699):

> "An act is done willfully if done voluntarily and intentionally and with a specific intent to do something the law forbids, that is to say, with the purpose either to disobey or disregard the law."

Petitioner contended below that it was error not to include "specific intent" as one of the elements of the offense in the court's charge to the jury.

B. Facts

Petitioner at the time of the prosecution of this case was a personnel staffing specialist, a GS-11 at the Norfolk Naval Shipyard in Portsmouth, Virginia, where he had been employed continuously for more than twenty-nine years. He joined the National Guard on March 17, 1947, and served until November

15, 1968, approximately twenty-one (21) years. Enlisting in the Guard as a private, he was promoted from time to time, commissioned as an officer in September of 1950 and in approximately January, 1957, he took command as Battery Commander of Battery C, Third Automatic Weapons Battalion, 111th Artillery, frequently known by its historical name "Grimes Battery," in the City of Portsmouth, Virginia. He has served approximately ten years as Battery Commander.

Over the ten-year period as Commander of the National Guard Battery, there were frequent occasions that the Battery was called upon by civic orginizations in Portsmouth to participate in their various public endeavors. In addition, Captain Melton became acquainted with Aubrey Johnson, City Manager for the City of Portsmouth, when Johnson was an auditor with the City prior to the time he assumed the office of City Manager in 1960. In addition to the wide civic participation of the Grimes Battery under Captain Melton, there came a time that his guard unit rendered substantial aid to the City of Portsmouth, following a severe and damaging hurricane, after which a very close relationship and rapport began to develop between the Battery, the City of Portsmouth, Captain Melton and the City Manager, Aubrey Johnson. Tr. 442.

Thus, a course of aid and assistance by the National Guard Unit to the City of Portsmouth developed through the close relationship between Johnson and Melton who had became close personal friends, frequently seeing and being with each other on many occasions, social and otherwise. Tr. 444.

As a result of his Naval Shipyard employment, Luther Melton, who then worked in the Supply Department, became familiar with the handling of and procedures for obtaining surplus government property. Somewhere around the years 1958 to 1960, he began dealing and working with surplus property in the scope of his employment. Tr. 445. It was not entirely unexpected, therefore, that in 1962 General Paul M. Booth, Adjutant General of Virginia, and Commandant of the Virginia National Guard, called Captain Melton to Richmond and, because of certain needed procedures in the handling of inventories of surplus government property by the

National Guard, requested Captain Melton to be General Booth's representative in the Tidewater area to handle surplus material. Tr. 446. While Melton was verbally authorized by General Booth to so act at that time, the authority was formalized by Colonel Harold S. Price, of General Booth's staff, by letter dated January 29, 1962 (Ex. D-3). Colonel Price served then and continues to serve as the United States Property and Fiscal Officer of the Virginia National Guard, under General Booth's command. Tr. 606.

Captain Melton described his understanding as to what General Booth desired of him in the handling of surplus property for the General, and the authority that was so delegated to him, in the following words at page 448 of the trial transcript:

> ". . . I don't think I – there was any question in my mind about what I was to do, and that was pretty darn much what he wanted me to do. He was a general, and he says, 'I want this piece of equipment; and I want those pieces of equipment; I want this; I want that,' and frankly speaking, I spent a great deal of my leave time for the Norfolk Naval Shipyard, on annual leave, running all over the countryside obtaining equipment for the General."

Mr. Melton continued:

> "My understanding was that I could draw any equipment for any purpose as long as, at that particular time, it was for National Guard use."

From that day forward Melton began to draw material in his capacity as surplus property representative for General Booth in the Natonal Guard in the Tidewater area. Melton

dealt in surplus property throughout the entire State of Virginia and was never questioned about it. Tr. 450. For some four years, from 1962 until 1966, no one questioned the regular, continuous and frequent obtaining, requisitioning, controlling and delivering of surplus government property by Melton. Tr. 450.

On many occasions Melton was personally requested by the General, himself, to obtain surplus property for a city and on no occasion did anything occur to raise any question in Melton's mind as to his authority to do what General Booth asked him to do. Tr. 452.

It was sometime during these years of Melton's close relationship with the City of Portsmouth and its City Manager and his own steadily enlarging authority in dealing with the surplus property for General Booth that the City of Portsmouth began to obtain some of the surplus property for the City's Civil Defense purposes. Tr. 454. Surplus property may properly be disposed of for civil defense purposes. General Booth was specifically asked whether or not property could be transferred by Melton to the City of Portsmouth's Civil Defense and he so authorized such transfers. Tr. 456.

Thereafter, there were frequent requests by the City of Portsmouth for similar transfers of property, which were done always in conjunction with City Manager Aubrey Johnson. Tr. 457. These transfers involved many other pieces of property and equipment that were not the subject of the indictments against Captain Melton. All of these transfers were open and unconcealed, and Melton testified that he felt that without question the City of Portsmouth's Civil Defense had a right to have the equipment and that he had a right to so transfer it. Tr. 458.

In addition to actual transfers of surplus property to the City of Portsmouth for Civil Defense purposes, there were other favors and gratuities extended to the City by the Battery

and Melton, such as the City's being able to take over the old Armory property as their own property when the National Guard moved into new quarters, which is now being used by the City as a library; disposal to the City of other vehicles and metal storage sheds no longer in use by the National Guard and many other similar transfers throughout the years, all of which property the City of Portsmouth still enjoys (Tr. 459).

Concerning the specific transfers of the several pieces of equipment that are the subject of this prosecution, Melton testified as follows at page 460 of the record:

"Q. Now there is no issue, there is no contest, is there, Mr. Melton, that you requisitioned that and you did ultimately transfer it to the City of Portsmouth?

A. I really did.

* * *

Q. Now, in each instance, Mr. Melton, did you believe that you were doing anything wrong?

A. Absolutely not.

Q. Did you think you had authority to do it?

A. No question in my mind about any authority.

Q. All right. In each instance of these that are this case and the many other things that were delivered to them, did you ever charge them for the quipment that you were transferring to them?

A. No, sir.

Q. Did you ever receive or attempt to obtain any money for the transfer or the sale or property?

A. No, sir.

Q. What was your understanding and what you told them of the nature of the transfer to them of government property?

A. Mr. Sacks, at the time that I transferred the property it was clearly understood that the property remained the property of the State of Virginia and subsequently must remain also with the National Guard."

And again, at page 461 of the transcript:

"Q. Was anything ever discussed or understood by you and transmitted to those with whom you dealt as to what would happen with the property if the Federal government wanted it back?

A. That it should be returned and would be returned.

Q. And in your dealing with Mr. Aubrey Johnson of anybody else for the City of Portsmouth was that made known to them?

A. Yes; it really was . . ."

Melton's testimony then indicated that when he was first contacted by the FBI that there was some question about the property transfers to the City. He immediately had City Manager Johnson place all the property back in a City compound until it could be straightened out. Later he met Agent Tuberson of the FBI again, and he was then told by Tuberson that the investigation matter had been cleared up and that he was "free now to give this property back to the City of Portsmouth," which was reported to both General Booth and the City of Portsmouth within a matter or two or three days. Tr. 470.

Melton testified that all transfers of property to the City of Portsmouth of equipment were at no cost to the City, nor did he receive any compensation therefor. At the time of the transfer of any government motor vehicle a standard United States Government form 97-A, entitled "Agency Record Copy of a United States Government Certificate of Release of a Motor Vehicle" was required to be executed by the transferor showing the nature of the transfer, the transferee and the "sale price," if any. Ex. D-1.

These forms all were completed and consequently demonstrated on their face that the property delivered by Melton to the City of Portsmouth was "transferred at no cost." Ex. D-12.

Subsequently, the City of Portsmouth as the transferee of these motor vehicles was required to make application, in writing, on its own behalf to the Virginia Division of Motor Vehicles for a certificate of title in the City's name. As part and parcel of effecting this transfer through the Division of Motor Vehicles of the Commonwealth of Virginia, the Form-97-A was required to be filed with the Division, showing the transfer at "no cost" together with application executed by the City itself corroborating the nature, terms and provisions of each such transfer of surplus property. Ex. D-12. Thus, in each instance the City confirmed the fact that there was no cost involved nor purchase consummated.

Melton testified that because of the rapport and relationship that grew up between him and City Manager Johnson, and the many things that continuously were being done by the Battery for the City, defendant sought the help of City Manager Johnson for raising some funds for Battery purposes. At page 476 of the transcript:

> "Over a period of years, as I had said, we had established, as you use the word, rapport and affiliation of the City of Portsmouth in doing the many things for them that we had done – that I didn't hesitate

> to go to Aubrey Johnson and ask him to contribute to our welfare. I didn't have any reservation about that. I was not bashful."

Melton explained that his National Guard Unit wanted to accomplish many things and wanted to be able to give parties and functions for people who could help them with influence and otherwise, and Aubrey Johnson's help in obtaining this money was requested. According to Melton, Johnson indicated that while he did not know for certain where the money could come from he would "see what I can do." Tr. 477. As a result, City Manager Johnson devised his own procedure where he, Johnson, would draw funds from the City of Portsmouth, setting up the Portsmouth City books in the fashion that he desired, and the money was contributed to the Grimes Battery through Luther Melton.

The City Auditor, Richard D. Ottavio, a government witness, acknowledged that it was his duty to prepare the checks that were authorized by City Manager Johnson. Tr. 113. In each instance of the transfers that are the subject of this prosecution, City Auditor Ottavio testified that the request for the funds was made by City Manager Aubrey P. Johnson. Tr. 115. On that point, Auditor Ottavio's testimony reveals the following at page 115 of the transcript:

> Q. Now, Mr. Ottavio, is it true the transaction between the City of Portsmouth for the acquisition of the property and Mr. Melton on behalf of the battery – you had nothing to do with that, did you?
>
> A. No, sir.
>
> Q. You're not able to tell us what the conversations were or what the terms of the acquisition of the property was, are you?
>
> A. No, sir.

Q. All you did, if I quote you correctly now, if I describe it correctly, is: Whenever the transaction or the agreement was made between Mr. Melton and Mr. Johnson, it would come to you in the ordinary course to issue a check? Am I right?

A. You're right, Mr. Sacks.

Q. All right. Now, Mr. Ottavio, where you put on the checks and on the invoices *for purchase*, you don't know whether they were bought or not; all you know is that's what you were told?

A. I was told either verbally or it was written on the invoice." [Emphasis added]

Under count five of the indictment, the subject equipment was a 1953 International Refuse Collection Truck, referred to in the evidence by the witnesses as an International Garbage Load Packer." Tr. 122. While the indictment set out the manufacturer's serial number as 1607, it was identified in the evidence as bearing serial number "37803." Tr. 125. The documents pertaining to that vehicle were introduced in evidence as Exhibit D-2, which exhibit consisted of a cancelled check of the City of Portsmouth, an invoice and a City invoice of Battery C. Tr. 129. Government witness Ottavio originally testified that his records as City Auditor showed that what was "paid" for the 1953 Garbage Load Packer was the sum of $398.25. Tr. 122. However, on cross-examination, it was discovered that Mr. Ottavio had in his file, other documents and papers (ultimately introduced as Exhibit D-2), which had not been included in the records that the government had introduced through him on direct examination and which clearly indicated that the Virginia Division of Motor Vehicles title, issued for the Garbage Load Packer in question, was not the Certificate of Title that was introduced as such by the government as part of government Exhibit 12, but was, in fact, a certificate still

in Ottavio's file, When the correct title was examined and introduced into evidence, it was clear that the $398.35 check, as testified to by Ottavio, was not for the "purchase" of the garbage truck, but that the City of Portsmouth's check, in the amount of $850.00, which the government contends was purchase money for the garbage truck, was not even given by the City, as authorized by City Manager Johnson, to defendant Melton, until *two years* after the title had been transferred, for the garbage truck, from the government to the City of Portsmouth. Tr. 127.

City Manager Aubrey Johnson also was unable to explain the situation, if, indeed, the $850 was given to purchase the garbage truck as contended by the government, as appears in the transcript at pages 204 et seq. When confronted with government's Exhibit No. 12, which included the Certificate of Title from the Division of Motor Vehicles for International Truck, Serial Number 37803, City Manager Johnson testified that the record showed that $850 was "paid for" the garbage truck. The cancelled City check for $850, dated October 27, 1967, some two years later, was shown to the City Manager and he was asked at page 205 of the transcript:

> "Q. . . . Now, would you look at the check for $850, dated October 27, 1967, for the Battery Fund?
>
> Can you account for why the $850 check attached to that invoice was paid in October of '67 if the City got title to the property in November of 1965?
>
> A. No, sir; I couldn't answer that.
>
> Q. Well, am I correct in the papers that the City produces here today, your Auditor, that the $850 check was associated with the garbage truck?
>
> A. Yes, sir. That's what the invoice says.

Q. Well, can you account, Mr. Johnson, in any fashion for why payment, if it was payment for it, came two years later?

A. No, sir; I cannot.

Q. Now, Mr. Johnson, isn't that exactly what I have asked you, that your understanding with Luther Melton was you got, the City of Portsmouth got, all of that free, as surplus property, but later, when he said, 'We would like to have some money for the battery,' you said, 'I'll give you an eight-hundred-and-fifty dollar check,' and you put it on your books in the City of Portsmouth as being the purchase price for that truck you had had for two years?

A. No, sir; I did not.

Q. All right. But you can offer no explanation today of why it's a two-year-late payment?

A. No, sir; I can't.

Defendant Melton testified that because of National Guard regulations he could not make whisky purchases directly from the Battery and thus the checks that were payable to the Battery Fund from the City of Portsmouth were endorsed by Melton, the authorized endorser for the Battery, and deposited openly to his personal account; that he thereafter drew personal checks for the purchase of liquor that was used in the social events, parties and festivities which Manager Aubrey Johnson was helping him with in return for the many favors and gratuities that the City was realizing from Melton's Battery.

Defendant's Exhibit 9 consists of some seventy-two checks drawn on Melton's personal account many, if not most, of which

were payable to Commissioned Officers Mess" representing purchases of whisky in large amounts. The representative of the bank verified the authenticity of the checks and indicated that this money had been drawn from Melton's joint personal account with his wife, and that the funds in fact had been paid over to the Commissioned Officers Club. One of the checks was to Anchor Merchandise Company in the amount of $4,327.55, explained by Melton to have been for Battery purposes for his men. This was for personal items, Christmas gifts, purchased by the men of the Battery but paid for through Melton's personal account. Tr. 487.

REASONS FOR GRANTING WRIT

I. Whether undocumented and unsupported accusations of other criminal offenses, forgery or embezzlement, unrelated to the prosecution of this case by the Assistant United States Attorney constituted reversible error.

The petitioner desires to raise before the Court the issue of the extent to which the government may introduce evidence of other criminal acts of an accused under the exceptions to the general rule prohibiting such evidence. *Michelson v. United States,* 335 U. S. 469, 475 (1948). The general rule is well established that inquiry into a collateral crime unconnected with the offense charged is prohibited. *Johnson v. United States,* 318 U.S. 189, reh. denied 318 U.S. 801 (1943). This prohibition includes attempts by the prosecution to establish either by cross-examination or by independent evidence, that it is likely that a defendant is guilty of the crime charged because he has committed prior criminal acts. *United States v. Hall,* 342 F. 2d 849 (4th Cir. 1965), cert. denied 382 U.S. 812.

Without any evidence to support its accusations, the prosecution suggested to the jury that petitioner had forged a name on an invoice (Tr. 503), and on another occasion that he had embezzled money (Tr. 571). The Court refused to instruct the

jury to disregard the question, but allowed the jury to consider the evidence as to Melton's credibility. Tr. 580. The prosecution failed to show any substantial relationship between the invoice or the purportedly altered figures which would counter-balance the grave prejudice caused by the remarks of the prosecution. The Court overruled petitioner's objection on the grounds that the supposed wrongful deposit of state funds went to his credibility. Tr. 577. This is not one of the established exceptions to the rule prohibiting evidence or suggestion of other crimes.

The most serious harm caused by the cross-examination of the petitioner was that it implanted in the minds of the jury the unsupported accusations of the prosecution that he was a forger and an embezzler. Such cross-examination was improper, and the Court's instruction (Tr. 580) about limiting their consideration of the check and deposit evidence to the defendant's credibility did not cure the error. The evidence was improper on the issue of credibility as well, because it was completely unrelated to the crimes charged or to any matter in issue. This is not the sort of passing reference to prior criminal behavior that does not constitute reversible error. *United States v. Dillinger*, 341 F. 2d 696 (4th Cir. 1965).

"[I]t is grossly improper for a cross-examiner to suggest that a witness has been convicted of crimes, especially felonies, when he has no support for the question." *United States v. Haskell*, 327 F. 2d 281, 284 (2nd Cir. 1964), cert. denied 377 U.S. 945 (no reversible error because of curative instruction and counsel's honest reliance upon an FBI report). Similarly, it has been held that a prosecutor's question concerning whether the reason a witness pleaded guilty was because the accused had given him $20,000.00 to plead guilty was improper where the prosecutor had no evidence or reasonable grounds to believe the truth of such allegation. *Lee Won Sing v. United States*, 215 F.2d 680 (D. C. Cir. 1954). And in *Shaefer v. United States*, 265 F. 2d 750, 753 (8th Cir. 1959), cert. denied 361 U.S. 844, the Court said that accusations of "embezzlement

and forgery" were improper although whether grounds for mistrial depended on several factors.

The only purpose which could have been served by the prosecution's attempt to brand petitioner as an embezzler and a forger was to portray him as a person well acquainted with the improper handling of public property. See *United States v. Guglielmini*, 384 F. 2d 602, 605-606 (2nd Cir. 1967) where the Court concluded that the prosecutor's references to defendant's connection with a previous bankruptcy fraud were unnecessary and prejudicial:

> "As the principal issue in this case was the intent of the defendants, it is clear that permitting the intrusion of this irrelevant matter, which involved nothing more than [defendant's] employment by someone who was later tried for bankruptcy fraud, was a substantial error."

It was an abuse of discretion to permit the prosecution's accusations to stand even though the entire line of inquiry was limited by the Court to the defendant's credibility. Such unsubstantiated accusations can only be presumed to have influenced the jury. The prosecution should not be permitted "by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevents defendant from having a fair trial." *State v. Heney*, 219 Minn. 518, 18 N.W. 2d 315 (1945).

In considering the potential prejudice to a criminal defendant of allowing improper cross-examination and evidence of other allegedly criminal behavior courts have generally engaged in a balancing test. In *Bradley v. United States*, 433 F.2d 1113, 1119-1120 (D.C. Cir. 1969), for example, the Court, in discussing the admissibility of evidence which revealed other criminal conduct said:

> "An inexorable requirement, obtaining as to all evidence unveiling another offense, is that its probative virtues must outweigh its prejudicial proclivities. '[T]he rule,' we have declared,' is that evidence of other offenses is admissible when substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweights the undue prejudice that may flow from it, but otherwise inadmissible.' Thus 'other offense' evidence proffered on an issue of identity must promise a real contribution in the process of proof of identity, for otherwise its help will be surpassed by its hurt. A reasonable need for the evidence must exist, and for as much detail as is to be let in, lest its value be exceeded by its damage. In sum, admissibility depends upon a plus quality in terms of its evidentiary capability in balance with its harmful portent." [Footnotes omitted]

The Court should review the decision below to clarify the extent to which trial courts may permit references to and accusations of prior criminality. The weight of the evidence in petitioner's case was not such as to render the prosecution's accusations harmless error, particularly in light of the fact that the jury was expressly instructed that they could consider such collateral evidence in weighing petitioner's credibility.

II. Whether it was reversible error for the trial court to refuse to permit into evidence certain letters from defendant's commanding officer which tended to show a course of dealing and which were offered to corroborate and clarify defendant's testimony as to his knowledge and intent in the transactions which were the subject of the offenses charged.

Petitioner desires this Court to consider the question of the extent to which a trial court may limit defense evidence introduced to corroborate a defendant's testimony, in general, and whether petitioner was so prejudiced by the refusal of the District Court to allow into evidence certain letters which showed a course of dealing in surplus property which would have materially supported his testimony that he acted without any unlawful intent.

Petitioner made no contest over whether he requisitioned and transferred the surplus property in question, but asserted that he honestly believed he had authority to do it. Tr. 460. The prosecution, on the other hand, attempted to show that Melton had received money for each of the pieces of equipment and produced records from the City of Portsmouth purporting to evidence payment for each item. Yet, on one occasion, the check for a garbage truck was made out two years after its acquisition. The equipment was registered with the State of Virginia showing a no cost transfer. Melton's explanation was that the City was giving money to the National Guard Battery for parties and was using the device of tying the checks to pieces of equipment to conceal what might otherwise have been improper expenditures from the point of view of the City, but not a crime on Melton's part.

Despite these inconsistencies in the evidence and the obvious motives that the Portsmouth City Manager and the Auditor might have had in seeking to deny such an explanation, rendering a factual determination far from conclusive in favor of the prosecution, petitioner was subjected to the prejudice of unsubstantiated accusations and a refusal of the trial court to permit him to corroborate his testimony with evidence that would have shown a course of dealing as bearing on his knowledge and intent.

The Court refused to permit into evidence certain letters from General Booth to petitioner, Defendant's Exhibit 7,

which would have shown a course of dealing and would have materially improved petitioner's defense which was that he believed he had authority to dispose of the property in the manner in which he did and that he was acting pursuant to guidelines from prior experience with the head of the Virginia National Guard, General Booth. See Tr. 242-246 where defendant attempted to inquire into prior property transactions where General Booth requested him to attempt to acquire certain surplus property for the use of certain municipalities. The Court refused to admit Defendant's Exhibit 7, (Tr. 243, 246) and refused to allow counsel to inquire into what the General told petitioner of the ownership status of equipment that was to be used by municipalities. These limitations by the trial court substantially impaired the defense in this case to the extent that the balance may well have been tipped in favor of the prosecution. Considering the record as a whole, it was an abuse of discretion to so limit the defense and consequently petitioner was deprived of his right to a fair trial under the Fifth Amendment to the Constitution of the United States.

It is an important element of fair trial that the jury consider only relevant and competent evidence on the issue of guilt or innocence. *Bruton v. United States,* 391 U.S. 123 (1968). "The trial judge has wide latitude in the admission or exclusion of evidence where the question is one of materiality or relevancy. [citations omitted] However, it is also the rule that where the proffered evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility." *Holt v. United States,* 342 F. 2d 163 (5th Cir. 1965).

In the case at bar criminal intent is a necessary element of the offense. *Findley v. United States,* 362 F. 2d 921 (10th

Cir. 1966). Similarly, the defendant's lack of authority and his knowledge of such lack of authority are essential elements of the offense. Petitioner should have been permitted to introduce evidence which could have reasonably supported his contentions as to these issues. It was manifestly unfair to him not to be allowed to corroborate his testimony about his intent, knowledge and the scope of his authority, particularly in view of the fact that wide latitude was allowed in the prosecution's inquiry into defendant's bank account and other activities. If such collateral matters are available, provided they are substantiated and relevant, to show guilty knowledge, 22A C.J.S., *Criminal Law* §615, p. 425, then surely the defendant should be permitted to introduce relevant evidence tending to show the absence of guilty knowledge.

In *Holt v. United States,* supra, the defendant claimed he was the victim of mistaken identity in being charged with transporting and selling stolen automobiles. The defendant attempted to introduce testimony that he was twice previously mistakenly charged with the same crime under similar circumstances and that the charges had been dismissed. The Court held that it was reversible error to exclude such evidence because it "tended to support [the defendant's] contention that there was another man who resembled him who was selling stolen cars . . ." The Court further said at 342 F. 2d 163, 166:

> " In these circumstances, the evidence was relevant and of substantial probative value. The jury should have been allowed to consider it on the question of identity, and its exclusion was error." [Footnote omitted]

While the facts are different in the case at bar, the Holt case is cited for the proposition that evidence of the scope of Melton's authority to deal in surplus authority which tends to corroborate his testimony concerning his knowledge and intent is of substantial probative value and would not tend to

prejudice or confuse. Evidence of Melton's correspondence with his superior officer and of his authority in acquiring surplus property was vital to his defense. It was reversible error to exclude such evidence, especially where the balance could easily have been tipped in petitioner's favor. This is shown by the inconsistencies in the prosecution's theory of the City of Portsmouth's payment for the equipment.

Neither, Johnson nor Ottavio could explain why a check for $850 was written two years after the acquisition of the relevant piece of equipment. Yet, they must have known that the equipment registration forms revealed no sales price, because they sent the forms to the State Division of Motor Vehicles. Further, the amounts of money involved are rather insignificant to be considered as purchase prices for functioning heavy equipment. All of these factors are consistent with defendant's explanation of the charges. In view of the seriousness of those charges and the weaknesses in the government's case, it was so unfair to limit the scope of Melton's defense as to amount to a denial of due process. The decision below is in conflict with the opinion of this court in *Bruton v. United States, supra,* and with the other cases cited and should be reviewed to correct an injustice to the defendant.

III. Whether it was reversible error for the trial court to refuse to include "specific intent" as one of the necessary elements of the offenses charged in its instructions to the jury.

Petitioner requests that this court grant a writ of certiorari to consider whether it was error for the District Court to refuse to instruct the jury that specific intent is a necessary element of the crime of unauthorized sale or transfer of government property under the circumstances of this case.

This Court has held that intent is an essential element to an offense under 18 U.S.C. § 641. *Morissette v. United States,* 342

U. S. 246 (1952). The trial court has a duty to specify the elements of the crime most closely related to the factual situation in the particular case. *Mitchell v. United States,* 394 F. 2d 767 (D. C. Cir. 1968) (holding that scienter was an essential element of an analogous District of Columbia statute). In *Findley v. United States,* 362 F.2d 921, 922-923 (10th Cir. 1966), a prosecution under §641, the Court held that the trial court's failure to recite the necessity of proving beyond a reasonable doubt that the sale of government property was made by the defendant with knowledge on his part that the property sold belonged to the United States and had been stolen from the United States was reversible error. The government in that case argued "that the inclusion of the terms 'knowingly,' 'willfully' and 'specific intent' and the further definition of those terms in the Court's questioned instructions [supplied] any otherwise existing legal deficiency." The Court of appeals did not agree and reversed the lower court:

> "In view of the fact that criminal intent and guilty knowledge are necessary ingredients of the offense charged, it was incumbent upon the trial judge to advise the jury, that in addition to the elements he enumerated, it was necessary for the government to prove beyond a reasonable doubt that the defendant knew that the property involved belonged to, and was stolen from the government. The use of the terms "willfully", "knowingly" and "specific intent" and the defining of those words in the instructions were not legally sufficient to adequately apprise the jury of the essential elements of the offense charged and the burden of proof imposed upon the government."

There was nothing in the trial court's instruction which satisfies this requirement. The jury may have gotten the impression that petitioner could be found guilty even though he believed he had authority to transfer the property that was

the subject of the indictments. This element happened to be the principal defense in the case. Petitioner did not deny dealing with the property but maintained that he did not believe he was acting unlawfully or beyond the scope of his authority. The trial court should have instructed the jury, as requested by defendant, that a specific intent to transfer without authority was required and that petitioner must have known that he did not have such authority. See *Souza v. United States*, 304 F.2d 274, 277 (9th Cir. 1962) where the trial court instructed the jury in part as follows:

> ". . . third, that when the defendant sold the property, he had the specific intent to sell the property without lawful authority, knowing it was property owned by and stolen from the United States . . ."

An omission of an instruction on an essential element of the offense that the defendant must have known property in question was stolen in order to convict him, is sufficient grounds for reversal, as it affects substantial rights of the defendant. *United States v. Baltruna*, 416 F. 2d 401 (10th Cir. 1969).

Although petitioner requested that the trial court instruct the jury on specific intent, presenting two proposed instructions which would have satisfied this requirement, Defendant's Requested Charges "A" and "B", Appendix, *infra*, the trial court refused, merely instructing the jury to the effect that the petitioner must have knowingly sold property of the government without authority in order to be convicted without making it clear to the jury that the defendant must also have known that what he was doing was illegal. An almost identical instruction as that given by the District Court below using the term "specific intent" as a definition or explanation of "willfully" was specifically disapproved by the Tenth Circuit in *Findley v. United States*, *supra*.

The decision below is squarely in conflict with *Morrissette v. United States*, *supra*, as well as with *Findley*, *supra*.

This Court should grant a writ of certiorari in order to correct error below which prevented petitioner from receiving a fair trial.

CONCLUSION

The petition for writ of certiorari should be granted for the above reasons.

Respectfully submitted

LUTHER DEWEY MELTON, JR.

By /s/ *Stanley E. Sacks*

His Attorney

Stanley E. Sacks
SACKS, SACKS & TAVSS
First & Merchants National Bank Bldg.
Norfolk, Virginia 23510

APPENDIX

APPENDIX

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OPINION OF THE FOURTH CIRCUIT COURT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,368

United States of America,

Appellee,

v.

Luther Dewey Melton, Jr.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, Richard B. Kellam, District Judge.

(Argued June 9, 1971 Decided September 9, 1971)

Before Judges Bryan, Craven and Butzner, Circuit Judges.

Stanley E. Sacks (Sacks, Sacks and Tavss on brief) for Appellant, and James A. Oast, Jr., Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

PER CURIAM:

Convicted on November 25, 1970 of eight counts of disposing in Virginia of property of the United States in violation of 18 USC 641, Luther Dewey Melton, Jr. appeals. He attacks the verdict and judgment of guilt on four grounds: (1) that "undocumented and unsupported accusations of other criminal offenses unrelated to the prosecution of this case by the Assistant United States Attorney constituted reversible error"; (2) that "certain evidence was improperly admitted before the jury and because of its inadmissible and prejudicial character, constituted reversible error"; and (3) that "certain evidence offered by the defendand should have been allowed into evidence"; and (4) that "the charge to the jury was improperly weighted in favor of the prosecution and [that] the Court failed to include material and necessary elements of the offense in the charge".

Inspection of the record and consideration of counsel's arguments, on brief and orally, convince us that the contentions of the appellant are insubstantial. The appeal cannot succeed.

Affirmed.

Form DJ-195
(Ed. 2-7-46)

No. _____

UNITED STATES DISTRICT COURT

EASTERN District of VIRGINIA

NORFOLK Division

THE UNITED STATES OF AMERICA

vs.

LUTHER DEWEY MELTON, JR.

INDICTMENT

Theft Government Property

(Title 18, §64)

A true bill,

_____
Foreman.

Filed in open court this _____ day

of _____, A. D. 19__

_____
Clerk.

Bail, $_____.

_____

DJ-U 937-461

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

UNITED STATES OF AMERICA

v.

LUTHER DEWEY MELTON, JR.

FILED IN OPEN COURT
SEP 8 1969
W. Farley Powers, Jr., Clerk
By s/ G. R. Old
Deputy Clerk

Cr. 149 69 N

SEPTEMBER 1969 TERM-At Norfolk, Va.

THE GRAND JURY CHARGES:

That on or about June 9, 1967, at Portsmouth, Virginia, in the Eastern District of Virginia and within the jurisdiction of this Court, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1953 Willys Jeep, VIN 7346111, property of the United States of a value in excess of $100.00. (Title 18, §641).

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

That on or about the 21st day of September, 1965, at Portsmouth, Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1953 Northwest Crawler Crane, Manufacturers Serial Number 15090, property of the United States of a value in excess of $100.00. (Title 18, §641).

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

That on or about the 29th day of October, 1965, at Portsmouth Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1951 GMC Tractor Truck, Manufacturers Serial Number 1030, property of the United States of a value in excess of $100.00. (Title 18, §641).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES:

That on or about the 29th day of October, 1965, at Portsmouth, Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR., did unlawfully, without authority, sell, convey, and dispose of a 1952 International Harvester Maintenance Line Truck, Manufacturers Serial Number 5972, property of the United States, of a value in excess of $100.00. (Title 18, §641).

COUNT FIVE

THE GRAND JURY FURTHER CHARGES:

That on or about the 29th day of October, 1965, at Portsmouth, Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1953 International Refuse Collection Truck, Manufacturers Serial Number 1607, property of the United States, of a value in excess of $100.00. (Title 18, §641).

COUNT SIX

THE GRAND JURY FURTHER CHARGES:

That on or about the 29th day of October, 1965, at Portsmouth, Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1964 Flat Bed Missle Trailer, Manufacturers Serial Number 1095, property of the United States, of a value in excess of $100.00. (Title 18, §641).

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES:

That on or about the 5th day of January, 1966, at Portsmouth, Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1951 Kochring Truck, Mounted Crane, Manufacturers Serial Number 7723, property of the United States, of a value in excess of $100.00. (Title 18, §641).

COUNT EIGHT

THE GRAND JURY CHARGES:

That on or about the 16th day of September, 1966, at Portsmouth, Virginia, in the district and jurisdiction aforesaid, LUTHER DEWEY MELTON, JR. did unlawfully, without authority, sell, convey, and dispose of a 1951 Chevrolet Panel Truck, VIN 14JS14043, property of the United States, of a value in excess of $100.00. (Title 18 § 641)

A TRUE BILL:

s/ David G. Ritter

FOREMAN

S/Brian P. Gettings

BRIAN P. GETTINGS
United States Attorney

COMMONWEALTH OF VIRGINIA

PAUL M. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 23219

29 June 1965

Captain Luther D. Melton
Commanding Officer
Btry C, 3d AW Bn, 111th Arty, VaARNG
PO Box 1125
Portsmouth, Virginia

Dear Luther:

We need one more fire engine and I hope, in your travels, you might be able to locate one.

I hope you will also continue your search for a boat, which we might use for the purpose stated to you.

May this serve as a reminder that we need one additional water tank, either truck or trailor, and one additional 1½ or 2½ ton dump or stake truck

Sincerely,

PAUL M. BOOTH
Major General
The Adjutant General

PMB:bjt

a-8

Commonwealth of Virginia
Department of Military Affairs
Adjutant General's Office
Richmond 23219

29 June 1965

Captain Luther D. Melton
Commanding Officer
Btry C, 3d Al Bn, 111th Arty, VaANG
PO Box 1125
Portsmouth, Virginia

Dear Luther:

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I hope you will also continue your search for a boat, which we might use for the purpose stated to you.

May this serve as a reminder that we need one additional water tank, either truck or trailor, and one add'tional 1½ or 2½ ton dump or stake truck.

Sincerely,

PAUL M. BOOTH
Major General
The Adjutant General

PMB:bjt

COMMONWEALTH OF VIRGINIA

PAUL W. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 23219

20 February 1964

Captain Luther D. Holton
PO Box 2125
Portsmouth, Va.

Dear Luther:

We have received another request for one additional fire engine similar to the one you located for us near Williamsburg. This equipment, although antiquated, was in excellent mechanical condition and required the minimum effort to put it in good order.

Your help in locating a similar piece of equipment with as much fire fighting apparatus, or a part thereof, would be most appreciated. If you will drop me a note when you have been successful, we will arrange for inspection and/or pickup.

Appreciating, as always, your interest in such matters, and with kind regards, I remain

Sincerely yours,

PAUL W. BOOTH
Major General
The Adjutant General

PWB:bjt

COMMONWEALTH OF VIRGINIA

PAUL N. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 23219

30 September 1966

CPT Luther D. Melton, Jr.
Btry C 3d Bn (AM)(SP) 111th Arty
P. O. Box 3295
Portsmouth, Virginia

DEFENDANT'S EXHIBIT 7 CR-1494-94

Dear Luther:

We are trying to locate once again a type of inboard vessel that can be used on one of our big lakes in Southwest Virginia to be maintained by the Wythe County Rescue Squad at Wytheville, Virginia. The type of ship that we are interested in would be a "Captains Gig" from a destroyer or larger ship, with a size from 20 to 25 feet with inboard power.

It would be appreciated if, in your travels you could locate such a vessel and inform me in order that I may make some inquiry to determine if you are successful in locating such a vessel if it would be accepted by the Rescue Squad.

Sincerely,

PAUL N. BOOTH
Major General
The Adjutant General

He also need a tank truck for our the County

RECEIVED
OCT 3 1966
PORTSMOUTH, VIRGINIA

COMMONWEALTH OF VIRGINIA

PAUL M. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 19

20 August 1963

Captain Luther D. Melton
PO Box 1125
Portsmouth, Va.

Dear Luther:

I have received a request from General Sproul for a small boat, either wood or metal, similar to the one which I have on Lake Christine. We do not request this boat gratis, but are willing to pay a reasonable amount for such a boat if it can be purchased on strictly a personal basis.

If you can assist in this matter, it will be greatly appreciated.

Sincerely yours

PAUL M. BOOTH
Major General
The Adjutant General

PMB:bjt

COMMONWEALTH OF VIRGINIA

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 23219

3 November 1961

Captain Luther B. Helms
P. O. Box 1125
Portsmouth, Virginia

Dear Luther:

I was informed by Colonel Ware that you have picked up the refrigerator in question and we hope, of course, that it will serve its purpose.

I have carefully gone through the attached listing of the several vehicles and note that practically all of them are classified SL.

The list is returned to you with the thought that we might obtain two ¼ ton pickups and two ¼ ton jeeps, the four being in the best condition of those available, and we could cannibalize one for the other. With this thought in mind, we will leave the matter to your discretion and whatever you think best, please so act. If, however, you feel that you could take two each in view of making one each good vehicle, please deliver these vehicles to Colonel Ware, who will be on the lookout for them.

Concerning the 6x6 vehicles, they appear from the report to be in very bad condition, and this will serve as a reminder that we are interested in a 6x6 vehicle as per our previous memo and telecon.

Appreciating your interest in this and many other matters, and with kind regards, I remain

Sincerely yours,

PAUL H. SMITH
Major General
The Adjutant General

Encls

PHS:bjc

COMMONWEALTH OF VIRGINIA

PAUL H. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 16

18 September 1962

Captain Luther D. Melton
PO Box 1125
Portsmouth, Virginia

Dear Captain Melton:

We are in need of a compressor, air, to be utilized in connection with our dental chair at ENR. This compressor is for the purpose of generating air in the filling and cleaning of areas to be filled by a dentist.

I hope this is sufficient information; however, if it is not, please advise and we will try to give you more nomenclature.

If you are successful in obtaining a serviceable compressor, it would be appreciated if you would turn it over to Major Hare for installation in the dispensary at ENR.

Sincerely yours,

PAUL H. BOOTH
Major General
The Adjutant General

hjt

COMMONWEALTH OF VIRGINIA

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 19

18 February 1963

Captain Luther D. Sutton
Serv C, 3d Bn 80, 111th Arty., Valnat
PO Box 1133
Portsmouth, Virginia

Dear Luther:

As per your request, I am returning the Manual, which you forwarded with your 13 February letter.

I cannot see a need for this in the foreseeable future and, to be perfectly frank, I do not understand its operation, except in connection with walk-in cold storage facilities.

For your information, we are renovating the cold storage plant, which we already have at the ration breakdown point at DSA and this is expected to accommodate any requirement in connection with rations.

It might be helpful if you could make some inquiries as to whether or not these units could be placed inside several buildings which we have, namely the Chapel, FS and some of the Headquarters Buildings, including OES. In this connection, I am sure you realize that a quiet operation of the unit would be a main consideration if we are to utilize the equipment when personnel are occupying the facility, particularly the Hqs. and OES areas. This may not be too much of a problem in the FS but may be in the Post Chapel.

Your assistance in this matter, as always, is very much appreciated.

Sincerely yours,

WILL H. SMITH
Major General
The Adjutant General

1 Incl:
Manual

WHS:kjt

COMMONWEALTH OF VIRGINIA

PAUL N. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 19

25 May 1962

Captain Luther D. Melton, Jr.
Commanding Officer
Btry. C, 3d AW Bn, 111th Arty., VaARNG
PO Box 1125
Portsmouth, Virginia

Dear Luther:

I am, as always, very appreciative of your many acts of assistance and I refer particularly to your recent thoughtfulness in sending the briefcase, as well as the framed photograph. The occasion of my visit in Portsmouth was so extremely pleasant that I am doubly happy to have the photograph as a memento of the occasion.

Both items came through in excellent condition and I again wish to thank you for this remembrance.

Sincerely yours,

PAUL N. BOOTH
Major General
The Adjutant General

hjt

Commonwealth of Virginia
Department of Military Affairs
Adjutant General's Office
Richmond 19

13 October 1961

Utilities Division and Disposition Service
General Services Administration
Personal Property Division
Regional Office Building
7th & D Streets SW
Washington 25, D. C. ATTN: Mr. Sam Sonkin

Gentlemen:

At the suggestion of Captain Luther D. Malton, Jr., please be advised that we are desirous of receiving five (5) miles of telephone cable, 25 pair or more, aerial, for use at the Military Reservation, Virginia Beach, Virginia.

Your assistance in this regard would be very much appreciated.

Yours very truly,

PAUL H. BOOTH
Major General
The Adjutant General

cc to: Capt Malton

a-19

COMMONWEALTH OF VIRGINIA

[illegible]

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 19

13 January 1963

Captain Luther B. Melton
PO Box 1125
Portsmouth, Va.

Dear Luther:

I have reviewed the attached and see nothing on the listing that will be of assistance at this time.

I have been endeavoring to obtain the following for use at SMR and if any or all of these items become available, we would be particularly anxious to have them:

with a 4 x 5 camera:

2 Battery Cases
1 Enlarger
6 Film Hangers
4 trays
1 Safe light
1 E.xil

with a 35mm camera:

1 35mm Developing Tank (small)
1 Enlarger
4 Trays 16.20
1 Safe Light
1 E.xil

I received the documents, which you sent several days ago, as well as the telephone bill, the latter of which was approved and submitted for payment.

With kind personal regards and best wishes, I remain

Sincerely yours,

2 Inclosure

Office Memorandum • OFFICE OF THE ADJUTANT GENERAL OF VIRGINIA

TO: Captain Luther D. Malton DATE: 5 December 1962

FROM: General Booth

SUBJECT: Surplus Property

In reviewing the attached, we would suggest that you try to obtain for us the ash and garbage cans and the coffee urns indicated on page 7. These two items are the only ones I can see any immediate need for, therefore suggest you procure them if possible.

Your assistance, as always, is greatly appreciated.

PAUL M. BOOTH
Major General
The Adjutant General

Inclosure:
Excess Property Bulletin #39, 30 Nov 62

COMMONWEALTH OF VIRGINIA

PAUL M. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 19

5 November 1962

Captain Luther D. Melton, Jr.
Commanding Officer
Btry. C, 3d AW Bn, 111th Arty., VaARNG
PO Box 1125
Portsmouth, Virginia

Dear Melton:

In reply to your message received on 2 November, we are interested in obtaining the 60 cu. ft. refrigerator and, accordingly, we are arranging to have this box picked up at the address given us.

Likewise, we are interested in the salad refrigerator and we are hoping that we can pick up both items in Washington on Thursday, 8 November. Would you please close both transactions with Mr. Sonkin.

With reference to the 2500 electric fans, I frankly feel that we could only use about 100 of these fans and would appreciate it if you could proceed to acquire these for us. They will be for delivery to SMR.

Please let me know when we might pick up the water coolers at Ft. Meade.

With kind regar , I remain

Sincerely yours,

PAUL M. BOOTH
Major General
The Adjutant General

bjt

COMMONWEALTH OF VIRGINIA

PAUL M. BOOTH
MAJOR GENERAL
THE ADJUTANT GENERAL

VIRGINIA NATIONAL GUARD
ADJUTANT GENERAL'S OFFICE
RICHMOND 19

26 October 1962

Captain Luther D. Melton
PO Box 1125
Portsmouth, Virginia

Dear Luther:

Thank you very much for your 24 October letter. Once again you have "brought home the bacon".

I am still hopeful that we may be able to obtain some kitchen equipment, such as 65 or 85 cu. ft. ice boxes, commercial type toasters, deep fat fryers, electric coffee urns, wood chopping blocks, potato peelers, electric ranges, electric hot plates, etc., so if you will pass this information along to Mr. Sonkin and if we are fortunate in obtaining some of these items for approximately 10 mess halls, I believe we will be in good shape.

We would like very much indeed to have the ten (10) water coolers referred to in your letter and if Mr. Sonkin can tell us where they are, I will arrange for pickup, delivering same to either SMR or to the warehouse in Richmond for subsequent delivery to SMR.

I would be delighted to see you and Mr. Sonkin anytime in Richmond at your convenience but, frankly, I do not believe we would accomplish much in furnishing him any additional requirements in view of the items indicated above. I will leave this matter to you and if you feel that a personal visit would assist, by all means extend the invitation to Mr. Sonkin at your convenience.

You are indeed to be congratulated on the efforts made to retain the DN in view of the recent screening letter. I would like to be in a position to say that all of our units have done the same thing, but regret that I cannot make this statement.

With kind regards and best wishes, I remain

Sincerely yours,

PAUL M. BOOTH
Major General
The Adjutant General

bft

THE COURT'S CHARGE TO THE JURY:

(Tr. p. 696)

* * *

THE COURT: Ladies and gentlemen of the jury, on behalf of counsel and myself, I thank you for giving attention during the presentation of the evidence and the argument of counsel in this case.

The defendant here stands charged in an indictment containing eight counts. The first count charges that on or about June 9, 1967, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and dispose of a 1953 Willys Jeep, the property of the United States, of a value in excess of $100.

Count 2 charges that on or about the 21st day of September 1965, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and dispose of a 1953 Northwest crawler crane, property of the United States.

Count 3 charges that on or about the 29th day of October 1965, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and dispose of
(Tr. p. 697)
a 1951 GMC tractor truck, property of the United States.

Count 4 charges that on or about the 29th day of October 1965, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and dispose of a 1952 International Harvester maintenance line track, property of the United States.

Count 5 charges that on or about the 29th day of October 1965, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and dispose of a 1953 International refuse collection truck, property of the United States.

Count 6 charges that on or about the 29th day of October 1965, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell convey and dispose of a 1964 flatbed missile trailor, property of the United States.

Count 7 charges that on or about the 5th day of January 1966, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and dispose of a 1951 Koehring truck, mounted crane, property of the United States.

Count 8 charges that on or about the 16th day of September 1966, at Portsmouth, Virginia, Luther Dewey Melton, Jr. did unlawfully, without authority, sell, convey and (Tr. p. 698) dispose of a 1951 Chevrolet panel truck, property of the United States.

Congress has enacted that whoever embezzles, steals, purloins or knowingly converts to his own use or the use of another or without authority sells, conveys or disposes of any record, voucher, money or other thing of value of the United States or of any department or agency thereof shall be guilty of an offense.

The defendant is here charged, in eight separate counts of an indictment, with having without authority sold, conveyed or disposed of certain property belonging to the United States. He is not here charged with any other violation of law, nor is any official of the City of Portsmouth or any other official of the National Guard here charged with any offense, nor is the propriety of the actions or conduct of any other individual here on trial. Your inquiry is whether or not the evidence before you establishes beyond a reasonable doubt that the defendant is guilty of any or all of the offenses charged.

You do not have for determination the propriety of the conduct of any of the other individuals whose names may have been mentioned in the evidence during this trial.

The elements of the offense or of each of the offenses for which the defendant is on trial are these – and the government is required to establish them beyond a reasonable (Tr. p. 699) doubt:

(1) That he knowingly and intentionally did sell, convey or dispose of property;

(2) That the property belonged to the United States or some department or agency thereof; and

(3) That such was done without authority.

As used in the law, the word "unlawfully" means contrary to law. So, to do an act unlawfully means to do willfully something which is contrary to the law.

An act is done willfully if done voluntarily and intentionally and with a specific intent to do something the law forbids, that is to say, with the purpose either to disobey or to disregard the law.

The word "knowingly" means that the act was done voluntarily and purposely and not because of mistake or accident.

Knowledge may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

Intent, as used in the statute, may be proven by circumstantial evidence. It rarely can (Tr. p. 700) be established in any other way. While witnesses may see and hear and thus be able to give eyewitness accounts as to what a person does or does not do, there can be no eyewitness account of the state of mind with which the action is done; but what a defendant does or fails to do may indicate intent or knowledge or lack of intent to do or to commit the offense charged or knowledge thereof.

In determining the issue of knowledge and intent, the jury are entitled to consider any statement made and any act done by the defendant and all of the facts and circumstances in evidence which may aid you in determining the state of mind.

There are two types of evidence from which the jury may properly find a defendant guilty of a crime:

One is direct evidence, such as the testimony of an eyewitness.

The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

The law makes no distinction between direct and circumstantial evidence.

The United States is not required to prove the facts in this case by direct evidence. It may do so by circumstantial evidence, but where the United States undertakes to prove (Tr. p. 701) the guilt of the defendant or any fact or element of the offense by circumstantial evidence it is the duty of the jury to scan such evidence with great care and caution, and the circumstances proven must be of such a character and tendency as to establish the guilt of the defendant beyond a reasonable doubt.

All military property issued by the United States, by or through any of its departments or agencies, to the National Guard remains the property of the United States.

In arriving at a determination of the issue before you, which is to weigh the evidence, from the evidence determine the facts, apply to those facts the law which is given to you by the Court in the charge, you have then for determination the guilt or the innocence of the defendant on each of the counts set out in the indictment.

There are certain well-known principles of law which apply to the trial of this case and to the trial of any case in a United States court.

A defendant enters on his trial under a presumption of innocence. This is an abiding presumption, goes with the defendant throughout the entire trial and applies at every stage of the trial until it is overcome by adequate proof.

The mere fact that an indictment has been returned against the defendant, charging him with eight separate offenses, is not

to be considered by you as even a circumstance in arriving (Tr. p. 702) at a proper verdict in this case.

The returning of an indictment is but a means of bringing the matter on for trial before a jury such as you so that you may hear all of the evidence, review the exhibits, hear the argument of counsel, the law as given in the charge by the Court and then arrive at a fair and impartial verdict as to the guilt or innocence of the defendant.

You are the sole judges of the credibility of the witnesses who have testified and the weight which you see fit to give to their testimony.

In determining the credibility of witnesses and the weight which you see fit to give to their testimony, you may take into consideration the demeanor of the witness on the witness stand, his apparent frankness or candor, his bias, if any, his interest or lack of it in the outcome of the proceedings, his opportunity for knowing the facts to which he has testified, and from these and all of the facts and circumstances of the case you are to determine the credibility of the witnesses and the weight which you see fit to give to their testimony.

During the course of the trial there have been conflicts in the testimony given by the witnesses. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. (Tr. p. 703)

In weighing the discrepancies, consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or from willful falsehood.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe the witness had been impeached and thus discredited, it is your exclusive province to give to the testimony of that witness such credibility, if any, as you think it may deserve.

If you believe from the evidence that any witness in this case has knowingly testified falsely as to any material fact in the case, you have a right to discredit all of the testimony of such witness or to give such testimony such weight and credit as in your opinion it is entitled to receive.

There has been evidence offered before you that on an occasion when the defendant was interviewed he made a statement to a representative of the Federal Bureau of Investigation. That statement has been admitted in evidence for your consideration, but before you can consider any such statement made by the defendant or give it any weight on the issue of his guilt or innocence you must believe beyond a reasonable doubt that it was made (Tr. p. 704) voluntarily and willingly, uninfluenced by any promise of reward or the use of any threat or injury and after he had been advised of his rights.

If you are convinced beyond a reasonable doubt from the evidence that the alleged statement was voluntarily made, without any promise or the use of threats, then you may consider the statement as evidence in the case for or against the defendant. On the other hand, if the evidence in the case does not establish the foregoing elements beyond a reasonable doubt, then you should disregard the statement in its entirety.

The burden rests on the United States in this case, as in every criminal case tried in a United States court, to prove beyond a reasonable doubt the guilt of the defendant before he can be convicted, that is, to prove beyond a reasonable doubt each of the elements of the offense for which the defendant is on trial.

Mere suspicion or probability of guilt, however strong, is not sufficient, nor is it sufficient if the greater weight or preponderance of the evidence supports the charges in the indictment.

To warrant a verdict of guilty against the defendant, the evidence must be so conclusive as to exclude every reasonable doubt.

If the jury have any reasonable doubt concerning the establishment of any essential element (Tr. p. 705) of the offense, then it is your duty to find the defendant not guilty.

Reasonable doubt, as used in the charge, is a doubt founded on your sound and reasonable judgment after a consideration of all of the evidence in the case.

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

A doubt engendered by sympathy or by a dislike to accept the responsibility of convicting a defendant is not a reasonable doubt.

Reasonable doubt is a doubt arising from the evidence or lack of the evidence after a consideration of all of the evidence. It is not a vague, speculative or imaginary something, but just such a doubt as would cause reasonable persons to hesitate to act upon it in matters of importance to themselves.

You have noted that the defendant is charged with separate offenses in each of the eight counts of the indictment. Each offense and the evidence applicable thereto should be considered by you separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged should not control your verdict with respect to any of the other offenses charged in the counts of the indictment.

The punishment provided by law is not a matter for the consideration of the jury. You will have fulfilled your duty

when you arrive at the determination of the issue of the guilt or (Tr. p. 706) the innocence of the defendant. The law has imposed upon the Court the determination of what punishment should be administered or given in the event there is a finding of guilty by you as members of the jury.

When you retire to your jury room, elect one of your members as foreman. It will be the duty of the foreman to preside over the proceedings, to see that each member of the jury has a full opportunity to express such juror's opinions and to discuss the evidence. The foreman has an equal right with other members of the jury to vote.

Any finding by you must be a unanimous finding of the jury.

When you have agreed upon a verdict, the foreman will record it upon the form which will be furnished to you.

Without suggesting to you what the verdict shall be, – and you will have to write separate verdicts as to each of the counts; eight separate verdicts – it is only necessary that you fill in the blanks – if you find the defendant guilty of the first count, then you will write in the blank the word "guilty"; if you find him not guilty, then you will write in the blank "not guilty". The same thing applies to the second and through the eight counts of the indictment.

When the verdict has been recorded, the foreman will sign it. It is already dated as of (Tr. p. 707) today's date. You will knock on the door and the Marshal will answer your call and advise the Court that you are ready to report.

If it becomes necessary during your deliberations to communicate with the Court, then the foreman will do so in writing. Paper and envelopes are provided in the jury room. The foreman will write a memorandum, place it in the envelope and send it in to the Court.

Now, do not make inquiry of the Marshal the answers to any questions. He's already been instructed not to make any

answers to any inquiries relative to this case or any case that may be propounded by any of the jurors.

Unless you have some question, ladies and gentlemen, you may now retire to the jury room; but do not commence your deliberations until the Court sends in to you the form of verdict and the exhibits in this case.

* * *

DEFENDANT'S REQUESTED CHARGES

A

And the Court further charges the Jury that since the element of a criminal or wrongful intent is a necessary ingredient and element in the offense charged in this case, it for any reason no such criminal intention existed in the mind of the defendant then he is not guilty of any offense. Thus, if you believe that the defendant, Luther Melton, had authority to requisition and dispose of Government property under certain circumstances and that he believed at the time he disposed of the property that is the subject of this case that his authority included the authority to dispose of this property then he is not guilty of any offense; and this is true even if he may have been mistaken in his belief, and even if you should believe that he should have known that his authority was not broad enough to cover such transfers of property.

The important, necessary and essential element that must be established to you beyond all reasonable doubt by the Government in order to support a conviction of Luther Melton is the knowing, wrongful and criminal intention to commit a wrongful act and violation of law. Proof and evidence that fall short in any degree of establishing that fact beyond all reasonable doubt is insufficient and it would be your duty to find him not guilty.

B

The Court charges the Jury that the burden rests upon the Government to prove beyond all reasonable doubt each and every one of the foregoing necessary elements of the offense charged against the defendant, Luther Melton, and if evidence fails to establish any one or more of such elements beyond all reasonable doubt then you must find the defendant, Luther Melton, not guilty.

Those elements are as follows:

1. First, that on or about the dates charged Luther Melton did sell, convey and dispose of the property referred to.

2. Second, that at the time of the selling and transferring the property it belonged to the United States or an agency thereof.

3. That when the defendant disposed of the property he did not have any authority to so dispose of the property, and that he knew he did not have any such authority.

4. That at the time the defendant, Luther Melton, disposed of the property to the City of Portsmouth that he had the specific intent to dispose of it without lawful authority, knowing that it was property of the United States that he had no authority to dispose of.

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OCTOBER TERM, 1971

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LUTHER DEWEY MELTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

HENRY E. PETERSEN,
Acting Assistant Attorney General,

ROGER A. FAULEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-509

LUTHER DEWEY MELTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1-2) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1971. The petition for a writ of certiorari was filed on October 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for the wrongful disposition of government property, cross-examination of petitioner as to his connection with a forged form and the manner in which he made a deposit of government money was proper.

2. Whether the trial court erred in excluding correspondence dealing with the procurement of property which was not the subject of the indictment.

3. Whether the trial judge's instructions on criminal intent were sufficient to encompass petitioner's theory that he was proceeding in good faith without the requisite criminal intent.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on eight counts of having knowingly disposed of government property without authority, in violation of 18 U.S.C. 641. He was sentenced to concurrent prison terms of three years on each count.

The evidence shows that during the period 1962-1966, petitioner, who was Commander of a National Guard artillery battery located at Portsmouth, Virginia, was authorized to draw surplus Department of Defense supplies for the use of the Virginia National Guard. The customary procedure was for petitioner's unit to be advised by state headquarters as to what was needed for National Guard purposes or for the unit to obtain prior approval before requisitioning surplus property. After the surplus was obtained, General Booth,

the Commanding General, decided upon its distribution through the state, with title to the property remaining with the federal government; all such distributions were without cost to the receiving organizations (Tr. 43-46, 75, 83, 219-232, 250, 453).[1]

Between 1965 and 1967 petitioner, dealing through the Portsmouth City Manager, one Johnson, offered to sell the City of Portsmouth military surplus equipment. After inspection, Johnson agreed to buy eight pieces of automotive equipment. Petitioner, in the name of his National Guard battery, requisitioned the desired pieces which were furnished to his unit without cost. Although petitioner had no authority to sell military surplus to the City of Portsmouth (Tr. 222, 249), he sold the eight pieces of equipment, which became the subject matter of the indictment, to the city for approximately $7,000; he deposited this sum in a personal checking account (Tr. 52-62, 88-111, 178-183, 199-200, 290-299, 479, 510).[2]

Other evidence showing petitioner's intent was introduced. In 1966 petitioner was interviewed by an investigating F.B.I. agent and signed a statement (Tr. 349-363) in which he expressed awareness that he was not authorized to sell a certain surplus government jeep which was then in his custody (Tr. 358-359).[3]

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[1] "Tr." refers to the three volume trial transcript which we are lodging with the Clerk of this Court.

[2] Petitioner also furnished some military surplus to the city at no charge. These transfers were not the subject matter of the indictment (Tr. 193-194, 402-404, 454-460; Pet. 8).

[3] Petitioner asserts that he received an interim F.B.I. clearance of his surplus property dealings with the city (Pet. 10). The F.B.I. agent denied giving any such clearance (Tr. 369).

However, this jeep was one of the eight pieces of equipment he sold to the city in 1967 (Count 1) (Tr. 55, 57, 363). Petitioner made the sale after his authority to requisition surplus had been revoked by General Booth (Tr. 247). None of the eight transactions with the city was recorded on the battery supply records (Tr. 325-326).

Petitioner testified that the City of Portsmouth had paid him for property which he had requisitioned and transferred to it. He explained that he had received the money for "giving" the property to the city and that it was understood that such property had to be returned on request to the federal government. He stated that the money given to him was intended by city manager Johnson to be the city's contribution to his unit's "welfare" or entertainment funds,[4] and that he handled this money through his personal account because of military regulations placing certain limitations on the use of official funds (Tr. 460-461, 472-473, 476-479).

ARGUMENT

1. Petitioner contends that his cross-examination was improper in that the examiner implied that he was a forger and embezzler in inquiring about matters which, it is claimed, were "completely unrelated to the crimes charged" (Pet. 16-19).

The question as to the forgery involved a heavy duty crane, part of a five vehicle sale by petitioner to the city (Counts 2-6). In making the sale, petitioner fur-

[4] City manager Johnson denied this and claimed that outright sales were made, with no duty of return (Tr. 197-200, 206, 214).

nished the city with a federal government form, purportedly signed by one Barnes, a United States property disposal officer, which directed the city to remit the loading charge directly to the Treasurer of the United States, with the balance payable to petitioner's unit (Tr. 100, 102, 106-108, 494).[5] Barnes, called as a government witness, testified that the government form had neither been prepared by his office nor signed by him (Tr. 156-157). On cross-examination, petitioner was asked about and denied forging Barnes' signature. This question was proper since petitioner's direct testimony of good intent and open dealings in making the property transfers tended to contradict Barnes' testimony concerning the falsity of the documents furnished to the city. The question of petitioner's planning and intent was critical; searching inquiry on cross-examination to test his credibility was clearly proper. See *Powers* v. *United States,* 223 U.S. 303, 315-316; *United States* v. *Prionas,* 438 F.2d 1049 (C.A. 8), certiorari denied, 402 U.S. 977; *Marteney* v. *United States,* 218 F.2d 258, 265 (C.A. 10), certiorari denied, 348 U.S. 953; *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F.2d 338, 369-370 (C.A. 9), certiorari denied, 343 U.S. 935.

As to the embezzlement question, in his direct testimony petitioner sought to account for the approximately $7,000 that he had received from the city by claiming that he had disbursed the money from his personal account for battery purposes on parties, whis-

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[5] Despite the request, the city included the loading charge in its purchase payment to petitioner's unit. Petitioner deposited the city check to his personal account, but thereafter had his battery pay the loading charge (Tr. 30, 106-107, 500, 505-506).

key and merchandise (Tr. 479-480, 482).[6] When petitioner's counsel asked why petitioner took $575 out of his personal account and deposited it in the battery fund, petitioner claimed an inability to recall (Tr. 483). Previously introduced evidence had indicated, however, that a battery fund is financed by state quarterly remittances so that a military unit may pay its incidental operating expenses and that petitioner in 1966 had accumulated three quarterly remittances before depositing them in the unit fund (Tr. 326-327). On cross-examination, petitioner acknowledged that these quarterly remittances had been deposited initially in his personal account and that some months later he had transferred an equivalent amount from his personal account to the battery account (Tr. 560-568). With the evidence in this posture, the prosecutor asked if petitioner had prepared the late deposits to the battery account in such a manner so as to conceal his earlier embezzlement of the quarterly checks (Tr. 571). After defense objection, the court ruled that the question was proper and instructed the jury that petitioner was not charged with embezzling these quarterly allotment funds, but that the purpose of the prosecution inquiry was to test petitioner's credibility (Tr. 577,

[6] Petitioner possibly accounted for $2900 of this money, that being the approximate amount of his whiskey purchases (Tr. 557). Petitioner makes reference to a $4,327.55 check to an Anchor Merchandise Company (Pet. 16). This is misleading as that check was not written against the $7,000 which petitioner had received from the City of Portsmouth for military surplus vehicles. The Anchor remittance was derived from money which petitioner had collected from his enlisted men. As petitioner acknowledged at trial on cross-examination, the payment to Anchor had "[n]othing whatsoever" to do with the present case (Tr. 558).

580). Despite the court's ruling, the prosecutor did not renew his inquiry and the question was never answered (see Tr. 580-581). This isolated reference resulted in no measurable prejudice. Moreover, the question was relevant on the issue of petitioner's intent and motive in making the sales of equipment since it showed his ready willingness to transfer battery funds to his own account.

2. Petitioner urges that the court erred by excluding correspondence he received from General Booth relating to past practices in his requisition of military surplus property "for the use of certain municipalities" since this would have shown the reason for his alleged belief that he had the "authority to dispose of the property" here involved in the manner in which he did (Pet. 4, 20-23). The letters (see Pet. App. 7-22), however, are not contradictory of General Booth's testimony that petitioner had no such authority, nor are they corroborative of petitioner's present claim. Indeed, at trial petitioner testified that General Booth controlled the distribution of all surplus property obtained for National Guard purposes (Tr. 453, 456) and that he was motivated to obtain the property for the city because city manager Johnson had requested him to do so (Tr. 457, 517). The excluded letters are merely amplifications of what was undisputed at trial—namely that petitioner, on many occasions, had been directed to search for various surplus items which the National Guard needed, and that, on some occasions, surplus so obtained was lent to a subdivision of the Commonwealth of Virginia (Tr. 230-232).[7] They do not show

[7] Such loans were for National Guard use when an emergency

any authority on petitioner's part to sell surplus to municipalities. Since the letters did not aid petitioner's defense and dealt with the procurement of items unrelated to the property involved in the instant case, they were properly excluded.

3. Petitioner contends that, under the trial judge's instructions (set forth at Pet. App. 23-31), the jury could have convicted him even though it found that he genuinely believed that he had authority to transfer the property to the city and had no intent to do anything illegal (Pet. 23-26). This contention is unfounded since the court made it clear that petitioner could be convicted only if he had acted "voluntarily and intentionally and with a specific intent" to dispose of government property without authority (Pet. App. 24-25). The instructions adequately embodied petitioner's theory of defense that he had acted in good faith. See *United States* v. *Bessesen,* 445 F.2d 463, 467-470 (C.A. 7).

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occurred in a regional area or were for the use of National Guard regional shops (Tr. 232, 599, 617; see Pet. App. 10). When such property was left with a state subdivision, for the convenience of the National Guard, title to the property, unlike the present case, was never transferred to the political subdivision of the state (Tr. 232, 238-242).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1971.

☆ U. S. Government Printing Office: 1971—448-846/283